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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1254

RIN 2590-AA53

Enterprise Underwriting Standards

AGENCY: Federal Housing Finance Agency.

ACTIONS: Proposed rule; withdrawal.

SUMMARY: The Federal Housing Finance Agency (FHFA) is withdrawing the proposed rule published in the Federal Register on June 15, 2012, concerning underwriting standards for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), (together, the Enterprises) relating to mortgage assets affected by Property Assessed Clean Energy (PACE) programs.

DATES: The proposed rule published June 15, 2012, at 77 FR 3958, is withdrawn as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Alfred M. Pollard, General Counsel, (202) 649-3050 (not a toll-free number), Federal Housing Finance Agency, Constitution Center, Eighth Floor, 400 Seventh Street, SW, Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

This rulemaking was initiated in response to a preliminary injunction issued by the U.S. District Court for the Northern District of California in 2011. The case challenged actions by FHFA to address certain energy retrofit lending programs administered by state or county governments. The District Court injunction made clear that, during pendency of court review and the ordered rulemaking, the determination of the Agency remained in place, specifically that Fannie Mae and Freddie Mac should take appropriate action to avoid purchasing new or refinanced loans that were encumbered by this retrofit lending program that created a priority ahead of the Enterprise lien priority.

As required by the preliminary injunction, FHFA published an Advanced Notice of Proposed Rulemaking at 77 FR 3958 (January 26, 2012) and received comments from individuals, government entities, businesses and scientific groups. Subsequently, FHFA published a Notice of Proposed Rulemaking at 77 FR 36086 (June 15, 2012) that proposed maintaining the current Agency directive or guidance as well as considering alternatives that might permit some alteration of those Agency actions. On August 9, 2012, the District Court, which had not acted to direct publication of a Final Rule, ordered that the Agency should complete the rulemaking, moving to a Final Rule under a set timeframe; California ex. Rel. Harris v. Federal Housing Finance Agency, 894 F.Supp.2d 1205 (N.D.Ca. 2012).

FHFA appealed the District Court rulings to the Ninth Circuit Court of Appeals. FHFA objected to the District Court's orders because they interfered with the exercise of Agency powers and authorities as provided by Congress in the Housing and Economic

Recovery Act of 2008. Two other circuit courts had ruled in FHFA's favor in similar cases; see Town of Babylon v. FHFA, 699 F.3d 221 (2nd Cir. 2012) and Leon County, Florida v. FHFA, 700 F.3d 1273 (11th Cir. 2012). Specifically, in the case of Fannie Mae and Freddie Mac, a bar on judicial review of conservator decisions contained in the Act limited court review. Also, the Agency asserted and the Ninth Circuit agreed that the challenged Agency actions involved the exercise of core conservatorship powers. Therefore, the District Court orders were invalid pursuant to the broad congressional bar against judicial action, such as those taken by the District Court, that would affect the exercise of the Conservator's powers and functions. On March 19, 2013, the Ninth Circuit overturned the District Court, vacated its direction to the Agency and dismissed the case against FHFA; County of Sonoma v. FHFA, 710 F.3d 987 (9th Cir. 2013). The Ninth Circuit ruling was a final disposition of this case.

II. Withdrawal of Proposed Rule

FHFA is withdrawing the court-ordered rulemaking on this subject. FHFA does not contemplate altering its policy regarding certain lien-priming energy retrofit loan programs at this time, but will continue its policy review of lending programs that would support energy retrofits and might be appropriate for purchase by the regulated entities.

III. Regulatory Classification

Since this notice withdraws a notice of proposed rulemaking, it is neither a proposed nor a final rulemaking and therefore is not within the scope of Executive

Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735 or the Regulatory Flexibility Act, 5 U.S.C. 601–612.

Edward J. DeMarco,
Acting Director, Federal Housing Finance Agency.

July 24, 2013
Date

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